UNITED STATES
v.
JOHN McDOWELL AND
MIGUEL NUNEZ

IBLA 80-881 Decided July 15, 1981

Appeal from decision of Administrative Law Judge Joseph E. McGuire declaring placer mining claim null and void. CA-5064.

Affirmed.

1. Administrative Procedure: Burden of Proof -- Mining Claims: Discovery: Generally

Where a Government mineral examiner testifies that he has examined a claim and found the mineral value insufficient to support a finding of discovery, a prima facie case of invalidity has been established.

2. Evidence: Generally -- Evidence: Sufficiency

The burden of the proponent is not simply to preponderate in the evidence produced; its burden is to produce a preponderance of credible evidence, and the trier of fact is not required to believe or give any weight to testimony which is inherently incredible.

3. Mining Claims: Discovery: Generally

A discovery of valuable mineral exists where the claim contains mineralization of sufficient quality and quantity to justify a prudent man in the further expenditure of labor and means, with a reasonable prospect of success in developing a valuable mine.

APPEARANCES: James A. Miller, Esq., Oakland, California, for appellant, John McDowell; Miguel Nunez, pro se; Patricia J. Cummings, Esq., Office of the General Counsel, U.S. Department of Agriculture, San Francisco, California, for appellee.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

This appeal is taken from a decision dated July 29, 1980, by Administrative Law Judge Joseph E. McGuire which declared the Dyer Creek placer mining claim in S 1/2 of sec. 25, protracted T. 6 N., R. 6 E., Humboldt meridian, Trinity County, California, null and void for lack of a valuable mineral discovery.

The contest was initiated by the California State Director, Bureau of Land Management (BLM), on behalf of the Forest Service, Department of Agriculture. A complaint was issued charging that no discovery of valuable minerals existed within the limits of the claim, that the land was nonmineral in character, and that the claim was not held in good faith for mining purposes. Hearings on the matter were conducted on May 1 and 2, 1979, in Eureka, California, and on July 17, 1979, in San Francisco, California.

By letter dated April 21, 1979, counsel for John McDowell requested a postponement of the hearing to June 18 on the grounds that McDowell's expert witness was recovering from cardiac surgery. By letter dated April 23, the Judge advised counsel that the hearing would proceed on May 1, but that the evidence of the expert witness would not be taken at that time. The testimony of appellant's expert was subsequently taken at the continuation of the hearing on July 17 in San Francisco. Appellants contend that the Judge abused his discretion and denied due process in that he (1) failed to set aside 2 days for the hearing, (2) refused to grant a postponement because of the expert witness' illness, and (3) refused to disqualify himself from the hearing. 1/

Appellants were accorded a 3-day hearing. 2/ As to the second contention, the following exchange between the Judge and appellant's counsel at the May 1 hearing is dispositive:

1/ At the hearing, and in this appeal, only appellant McDowell is represented by counsel. Appellant Nunez's statement of reasons for appeal adopts the statement of reasons filed on behalf of appellant McDowell.

2/ The Judge was eminently reasonable in assuming, given the limited number of witnesses, that the hearing could be completed in one day, except for the testimony of McDowell's expert witness. Once the Judge became aware of the tenor of hearing, the following exchange took place at approximately 3:10 p.m. on the first day of the hearing:

JUDGE McGUIRE: * * * You requested a continuance in this hearing because your mining engineer, one Mr. Travis, is presently incapacitated owing to very recent heart surgery. You felt that your client would be denied due process if his testimony was secured separately and independent from the remaining testimony in this cause.

MR. MILLER: Well, Your Honor, I was uncertain whether you were foreclosing him totally or not. I'd just like to be absolutely sure, so I understand what's going on here.

JUDGE McGUIRE: Absolutely not. You were assured over the telephone and I thought my letter of April 23 set this out fairly, but if, in fact, it didn't, you're being apprised at this moment that we will secure the testimony of Mr. Travis at a later date. And you would be given every opportunity to put his testimony and his documentary evidence on the record also, before we reach a decision in the matter.

MR. MILLER: I see. Would that be a further hearing set before you in this --- (interrupted)

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fn. 2 (continued)

MR. MILLER: Yes, Your Honor. I would like to indicate, for the record, that during the recess Your Honor approached me and stated that all testimony in this case would be completed today, regardless of whether this case went into the evening, and I simply want to state, once again, for the record, that it is my belief that this will take more than the one day allotted to us, and I've made that intention clear prior thereto.

JUDGE McGUIRE: I really think I've been told by the Government's attorney that following the testimony of Mr. Manchester, there is one other witness, and I believe you have two witnesses in the courtroom. I don't see why we couldn't conclude the taking of testimony this evening or tonight, but we'll have to see how that goes. And, of course, we don't include your witness's testimony. His testimony will be taken at a later time, so you may then continue with your cross-examination of the witness, Mr. Miller. (Tr. 175). This is a clear indication that the Judge hoped to be able to conclude the scheduled testimony in one day. The Judge could not reasonably have anticipated that McDowell's counsel would not complete cross-examination of the Government's first witness until 10:33 p.m. (Tr. 373).

JUDGE McGUIRE: Sure. It would be a supplemental hearing.

MR. MILLER: I see.

Tr. 12.

Also, in the following exchange McDowell's counsel clearly consents to the taking of the expert's testimony at a later time.

JUDGE McGUIRE: Well, if we have to continue the case to secure the testimony of your witness, sir, you would not be further, or in any manner, prejudiced if we secure other testimony at a later date, either, would you, sir?

MR. MILLER: No, that's fine. I just wanted to make -- (interrupted)

JUDGE McGUIRE: Okay. So, what we don't secure today, we'll secure at a later date.

MR. MILLER: Fine.

Tr. 20-21.

One can hardly argue that refusal to postpone the hearing was an abuse of discretion, when one consents to the taking of evidence at a later date and agrees that such would not be prejudicial to his case.

Appellants amplify their third contention by suggesting that the Judge indulged in personal attacks upon McDowell's counsel and impugned his legal efficacy, specifically in that on May 1 the hearing was conducted till late in the evening, to 10:49 p.m.

We have reviewed the record with close attention to the citations given to support the above allegations and we find these allegations to be totally without merit. The reason the hearing lasted into the evening hours was because of counsel's protracted and repetitive cross-examination of one of appellee's witnesses. The record shows the Judge to have been fair, evenhanded, and considerate of counsel's inexperience in proceedings of this type. 3/ Appellants' contentions of lack of due process, denial of a fair hearing, and other procedural shortcomings are devoid of substance and completely unjustified by the record in this case.

3/ Representative transcript references are: Tr. 17-22, 45, 90, 248-51, 337.

Appellants' substantive argument is that the decision is contrary to the evidence. Appellee's evidence was presented chiefly by two geologists who examined the claim and concluded that a prudent man would not be justified in expending time, money, and effort in a reasonable expectation of developing a paying mine. Samples taken by the geologists were analyzed by an independent assayer firm and found to be insufficient in quantity, quality, and value to constitute a discovery.

[1] It is well settled that a prima facie case is established by the United States when a Government mineral examiner testifies that he has examined the claim and can find no evidence of a discovery of a valuable mineral deposit. United States v. Harden, 42 IBLA 206 (1979); United States v. McClurg, 31 IBLA 8 (1977); United States v. Reynders, 26 IBLA 131 (1976). The Judge properly concluded from the evidence that the Government established a prima facie case of lack of discovery of a valuable mineral deposit.

The Judge then evaluated the evidence to determine if appellants had established a discovery by a preponderance of the evidence. Appellants' major evidence was also given by a geologist, Mr. Travis. That evidence, as summarized in the decision, is as follows:

> Mr. Travis spent 1 day on the claim, for which he was paid $85, and advised him (contestee McDowell) orally on the date of the inspection that the value of the gold on the claim was approximately $300,000, based upon the gold value of its pay gravel being $35 per yard. Mr. Travis had not secured an assay report of his mineral samples to the date of the hearing. Although neither he nor Mr. Travis core drilled in the course of their inspections, he felt the Government should have done so in order to properly evaluate his claim. He has not formulated a development plan for the claim but was working out the details of such a plan with Mr. Paul Travis at the time of the hearing.
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> * * * [Mr. Travis'] sample materials were washed and washings taken to a nearby town to dry. A magnet was used to remove the gold from the black sand and 1 gram of gold was recovered in that manner. He estimated the total value of the deposit on contestees' placer mining claim, which measures some 6 to 6-1/2 acres, as being $300,000 and estimated that the cost of removing the overburden would be $65,000. His development plan included the use of certain types of Caterpillar tractors that may not be available in that area, however, and further conceded that it may not be

> possible to secure the required rights-of-way to bring that equipment onto the claim. The workings were not sent to an independent assayer and no formal written report of his examination has been prepared because Contestee McDowell did not request one and further because ill health has prevented him from taking the 4 to 6 hours necessary to prepare such a report. He concluded that contestees' claim is mineral in character, that it is in a gold-bearing belt, and that the Government's samples consisted of overburden and not New River gravel, which contains the mineralization.

Decision at 4-5.

In evaluating appellants' evidence, the Judge stated: "In weighing the conflicting testimony and assigning to the hearing testimony that weight which the credibility of the witnesses and their demeanor compels, I find that they [appellants] have failed to do so [overcome the Government's prima facie case]." Decision at 9.

[2] The Board has authority to reverse the findings of fact of an Administrative Law Judge, even when not clearly erroneous. Where the resolution of the case, however, is influenced by the Judge's findings of credibility, which in turn are based upon the Judge's reaction to the demeanor of the witnesses, and such findings are supported by substantial evidence, they will not ordinarily be disturbed by the Board. United States v. Melluzzo, 32 IBLA 46, 75 (1977), aff'd, Melluzzo v. Andrus, No. CIV 79-28-PHX-CAM (D. Ariz. May 20, 1978); see Holland Livestock Ranch 52 IBLA 326, 350, I.D. (1981). The basis for this is that the trier of fact who presides at the hearing has an opportunity to observe the witnesses, and is in the best position to judge the weight to be accorded testimony. United States v. Chartrand, 11 IBLA 194, 212, 80 I.D. 408, 417-18 (1973).

[3] The prudent man test dictates that in order for a mining claim to be valid, the claim must contain a mineral deposit of such quantity and quality as to justify a person of ordinary prudence in further expenditure of time, labor, and means in the development of a paying mine. United States v. Coleman, 390 U.S. 599 (1968); Chrisman v. Miller, 197 U.S. 313, 322 (1905). Appellants' estimates of a deposit worth $300,000 is, in and of itself, insufficient to overcome the negligible assay values presented by appellee.

We find no error in the Judge's evaluation of the evidence and his conclusions of law comport with the applicable authorities. Therefore, his decision will not be disturbed.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Gail M. Frazier
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Bruce R. Harris
Administrative Judge